UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 804

Case No. 898: ABOURA

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 12 November 1995, Mohammed Thahim Aboura, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal to:

"i. Reinstat[e] Applicant to duty with effect from his release from military service, and consider the period of cessation as special leave with full pay.

ii. In the absence of reinstatement by the Respondent because of the disability and medical unfitness of the Applicant to work as a Teacher, order the Respondent to pay Applicant the difference between the indemnity of termination between disability and 'non availability'.

iii. Payment of secretarial and legal counselling fees estimated at US$700."

Whereas the Respondent filed his answer on 14 May 1996;

Whereas the Applicant filed written observations on 26 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 21 October 1985, as a "D" Teacher at the Khalsa School in the Syrian Arab Republic (SAR) at the grade 6, step VII level, on a probationary one-year appointment. His Letter of Appointment stated, as a special condition, that:

> "...
>
> (b) "The undertaking signed by you in respect of military service on 15.10.85 forms a part and parcel of this Letter of Appointment".

The undertaking was that, in case the Applicant were called for military service, the Agency would not be obliged to keep his post open during his absence.

In early March 1990, the Applicant advised the Area Officer, Damascus, that he was required to report for military service on 1 April 1990. On 5 March 1990, the Field Personnel Officer wrote to the Applicant and advised him that, in accordance with the Agency's policy in relation to staff members who are absent from their posts due to military service, the Applicant had two choices. The first was to apply for special leave without pay from 1 April 1990, up to a maximum of two and a half years (Option A), or, alternatively, to have his services terminated for non-availability for service, with effect from 30 April 1990 (Option B). If the Applicant chose Option B, he would be "paid salary in cash in lieu of 30 days notice of termination in addition to ... separation benefits and a Termination Indemnity under Area staff regulation 9.1 and Area staff rule 109.9". Should the Applicant choose Option B:

> "[T]here will be no commitment on the part of the Agency to re-employ you; therefore, if and when you apply for re-employment with the Agency in future, consideration of your re-employment shall be the subject to the availability of vacant posts ... and shall be based on your suitability ... for the respective post".

The Applicant submitted his resignation on 16 April 1990, citing his induction into military service. The Agency treated the Applicant's letter of 16 April 1990 as being a choice by the Applicant of termination for non-availability for service (Option B) and not a resignation or a request for special leave without pay (Option A). The Applicant's separation benefits were calculated and paid accordingly, with termination to take effect from 15 May 1990, due to the Applicant's non-availability for service.

On 16 April 1990, the Applicant signed an Employee Clearance Certificate and, on 9 July 1990, he requested a certificate of service. A certificate of service, dated 15 July 1990, was provided and stated that the Applicant's reason for leaving the Agency was "termination for non-availability for service".

On 25 June 1990, the Applicant wrote to the Deputy Director of UNRWA Affairs, SAR, stating that he had contracted an illness of the pharynx during his teaching service with the Agency in 1989 and that, on 1 June 1990, he had been "discharged from military service on medical grounds for the same illness". He requested to be examined by a medical board to determine his fitness for service, so that, if "found unfit, especially that my sickness is attributed to work", he could receive "termination benefits on medical grounds".

On 21 August 1990, the Field Personnel Officer, SAR, asked the Field Health Officer, SAR, whether, based on the Applicant's medical history, reference to a medical board was warranted. On 25 August 1990, the Field Health Officer, SAR, advised the Field Personnel Officer, SAR, that an audiogram test performed on 14 March 1990 indicated that the Applicant had a "severe neurosensory hearing defect in his right ear". Also, a specialist who had examined the Applicant on 10 March 1990 found that the Applicant had "Menier's disease". On that basis, the Field Health Officer, SAR, believed that the Applicant's "health status may justify referring him to be examined by a medical board".

On 6 October 1990, the Field Health Officer was requested to convene a medical board:

> "to determine whether or not [the Applicant's] illness is attributable to his service with the Agency, the degree of disability, whether it is permanent or temporary, and whether it hinders him from performing the duties of a teacher".

After examining the Applicant, the Board concluded as follows:

> "The staff member is unfit for performing his duties as a teacher, but he is able to perform other administrative duties. His illness is not attributable to his service with the Agency".

On 22 November 1990, the Applicant wrote to the Area Officer, Damascus, asking to be re-employed following his release from military service.

In a reply dated 16 December 1990, the Field Personnel Officer advised the Applicant as follows:

> "Please be advised that the Medical Board which examined you on 8 November 1990 has decided that you are unfit for performing the duties of a teacher, but you are able to perform administrative duties, and that your illness was not attributable to your service with the Agency.
>
> In view of the above and as your services with the Agency had already been terminated due to non-availability for service, your request mentioned above cannot unfortunately be acceded to.
>
> Should you wish to be re-employed by the Agency, you shall have to apply in response to vacancy notices for suitable posts, excluding teacher posts, and your application shall be considered along with other applications in accordance with the established norms, procedures and requirements of employment in the Agency."

On 6 November 1994, the Applicant wrote to the Director of UNRWA Affairs, SAR (the Field Director) again requesting that he be reinstated into the Agency's service. On 20 November 1994, the

Officer-in-Charge, Personnel Division, SAR, replied, on behalf of the Field Director, as follows:

> "Having studied your request carefully and reviewed your personal file, I regret to advise that the Agency cannot satisfy your request, because the Medical Board which examined you on 8 November 1990, upon your request, declared you 'unfit for performing the duties of a teacher, but able to perform administrative duties ...'
>
> Though the Medical Board conclusion does not militate against your employment in administrative posts, I feel that if you would wish to apply for such posts your chances for re-employment would be so meagre in view of your lack of administrative and clerical experience and your past record of service, which is completely discouraging, for the Agency to have you re-employed".

On 30 November 1994, the Applicant again wrote to the Field Director requesting reinstatement into the Agency's service. In a reply dated 6 December 1994, the Field Director stated that he had investigated the matter personally and that, in view of the background reports in the Applicant's file documenting incidents of unauthorized absence and low quality of performance, he was unable to accede to the Applicant's request for reinstatement.

On 5 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB) seeking reinstatement into the service of the Agency, retroactive to the date when he had first applied for reinstatement.

The JAB adopted its report on 14 July 1995. Its findings, evaluation and judgement read as follows:

> "III. BOARD FINDINGS, EVALUATION AND JUDGEMENT
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> 23. In its deliberations, the Board considered all documents cited before it, including the Appellant's personal file, and came out with the following:
>
> a. When he joined the Agency, the Appellant signed an acknowledgement that the Agency would not keep his post open if he was called for military service.

b. On 5 March 1990, the Appellant was given a letter by the Field Personnel Officer which clearly states that, if he was called to military service and chose to have his appointment with the Agency terminated due to his non-availability instead of requesting a period of special leave without pay and returning to the Agency within a specified period of time, there was no commitment on the part of the Agency to re-employ him, and if he wished to seek re-employment it would be in accordance with normal Agency procedures for filling vacant posts, including competition with applicants.

c. The Appellant submitted his resignation on 16 April 1990 due to his induction into military service and, therefore, his services with the Agency were terminated due to non-availability for service.

d. After his release from military service on medical grounds, the Appellant requested referral to a medical board to determine whether his illness was attributable to his service with the Agency.

e. On 8 November 1990, the Medical Board which examined the Appellant concluded that he was unfit for service as a teacher but was able to perform administrative duties. The Board also concluded that the Appellant's illness was not attributable to his service with the Agency.

The Appellant then requested re-employment with the Agency on 22 November 1990, but was informed by the Field Personnel Officer in his letter dated 16 December 1990 that he should apply in response to vacancy notices for suitable posts, excluding teacher posts. The Field Personnel Officer also conveyed the conclusions of the Medical Board in the said letter.

The Appellant waited until 6 November 1994 to reiterate his request for re-employment with the Agency, a request that was declined on 20 November 1994 by the Officer-in-Charge, Personnel Division.

The Appellant submitted his appeal to the Board on 5 January 1995.

Based on the above findings and by reference to Area staff regulation 11.1(A) and Area staff rule 111.3 governing appeals, appeal procedures and time limits, the Board resolved that:

The Administration has dealt with the Appellant's case in conformity with standing rules and has properly applied its policy concerning staff members who join military service to the Appellant.

The Board could not establish that the Administration's decision was motivated by prejudice or any other extraneous factors.

The Board is also of the opinion that the Appellant's case does not invoke the competence of the Board due to the long lapse of time between the date of the Appellant's separation from the Agency's service and first request for re-employment in 1990 on the one hand, and the date of his second request for re-employment on the other.

RECOMMENDATION

In view of the foregoing, and without prejudice to any further oral or written submission to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to hold the administrative decision appealed against; and that the case be rejected."

On 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB's report and informed him as follows:

"... You will note that the Board found that the Administration had acted in conformity with its standing rules and properly applied its policy concerning staff members who join military service in this case, and further that your appeal did not invoke the competence of the Board due to the long lapse of time between your requests for re-employment and the institution of your appeal.

I have carefully reviewed the Board's report and agree with its conclusions and recommendations. Your appeal is therefore dismissed."

On 12 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant is entitled to a termination indemnity for disability as he was unfit to continue as a Teacher prior to his termination for non-availability for service.

Whereas the Respondent's principal contentions are:

1. The application should not be received due to an unreasonable delay by the Applicant.

2. The Applicant has no right to reinstatement.

3. The Applicant was not incapacitated for further service with the Agency at the date of termination.

The Tribunal, having deliberated from 22 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant separated from service with UNRWA in 1990, because he was inducted into military service. Shortly thereafter, he was discharged from military service on medical grounds, due to a condition that he claimed arose during his UNRWA service. The Applicant then requested a medical board examination because he asserted that his condition was due to a disease he had contracted during his service with UNRWA. The Medical Board determined that his illness was not attributable to service. It further determined that the Applicant was physically unfit to perform the duties of a Teacher but could perform administrative duties despite his medical condition.

II. In 1990, and again in 1994, the Applicant unsuccessfully requested reinstatement in UNRWA but no job could be found for him. In this appeal, the Applicant seeks reinstatement, or, alternatively, the payment of disability benefits. The Joint Appeals Board (JAB) determined that the Applicant's case was not

receivable due to the long lapse of time between the Applicant's separation from service and his initial request for reinstatement in 1990, and his second request and appeal in 1994. The Tribunal has not found any convincing explanation for this delay of nearly four years. The JAB further noted that the Agency had properly applied its rules and policy concerning staff members who are inducted into military service. There was no finding of prejudice or other extraneous factors in the application of the rules and policy.

III. While the Tribunal is sympathetic to the difficulties which the Applicant has faced, it can find no basis on which to grant him relief. His medical condition was found to be not attributable to service. His separation was not for reasons of health and was not initiated by the Agency. Hence, he had no right to reinstatement.

IV. For the foregoing reasons, the Tribunal rejects all the Applicant's pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary